Supreme Court, U.S.
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No. 95-371

In The

Supreme Court of the United States

October Term, 1995

DOUGLAS COUNTY, OREGON,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, HEADWATERS, INC. AND UMPQUA VALLEY AUDUBON SOCIETY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

TODD D. TRUE
Counsel of Record
PATTI A. GOLDMAN
SIERRA CLUB LEGAL DEFENSE FUND
705 Second Avenue, Suite #203
Seattle, Washington 98104
(206) 343-7340

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the court of appeals correctly conclude that the unique and comprehensive statutory procedures for designating critical habitat to protect a threatened species under the Endangered Species Act ("ESA") supplant the requirement to also prepare an environmental impact statement ("EIS") under the National Environmental Policy Act ("NEPA") for the habitat designation?

2. Did the court of appeals correctly conclude, consistent with this Court's decisions interpreting NEPA, that the statute's command to prepare an EIS for major federal actions that "significantly affect the quality of the human environment," 42 U.S.C. § 4332(2)(C), does not apply to actions that do not cause any "change in the physical environment," *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)?

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should deny Douglas County's petition for a writ of certiorari because the ninth circuit decided the case below on two alternate grounds, neither of which conflicts with the decisions of this Court or any court of appeals.

The court of appeals' primary reason for concluding that an EIS is not required for the designation of critical habitat under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, – that the procedures for designating critical habitat under the ESA supplant those of NEPA – does not conflict with the Court's decision in *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776 (1976), or the decision of any court of appeals. It also does not break any new ground under either NEPA or the ESA.

The court of appeals' alternate ground for decision – that the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, does not apply to actions that leave the natural environment unchanged – does not involve any implied exemption from NEPA as petitioners assert. Instead, the decision is consistent with the express language of the statute and the decision of this Court in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

STATEMENT OF THE CASE

This case involves an ironic and misguided effort by Douglas County, Oregon, to compel the preparation of an

EIS to accompany the government's designation under the Endangered Species Act of critical habitat on federal lands to protect the threatened northern spotted owl.

Douglas County's effort is ironic because its primary concern with the designation of critical habitat for the owl is not protection of the environment from significant adverse impacts at all but protection of County revenue derived from logging of federal timber lands. As explained succinctly in the declaration of Douglas Robertson, Chairman of the Douglas County Board of Commissioners:

> I have reviewed the proposed rule known as "Endangered and Threatened Wildlife and Plants; Revised Proposed Determination of Critical Habitat for the Northern Spotted Owl; Proposed Rule" dated August 13, 1991. As part of this proposed rule the [U.S.] Fish and Wildlife Service has estimated that the designation of critical habitat in Douglas County will result in an 82% decrease in the harvest level on the lands managed by the Roseburg Bureau of Land Management and a 43% decrease in harvest on lands managed by the Umpqua National Forest. *Since the receipts from the timber harvests on these two land management units represent the majority of the operating funds received by Douglas County the reduction in harvest level will adversely affect the social and economic well being of the county.*

Declaration of Douglas Robertson at 3-4 (D.Ct. Docket No. 17) (emphasis added). For this reason, the court of appeals, in rejecting Douglas County's attempt to compel preparation of an EIS, observed, "[w]e are reluctant, . . . to make NEPA more of an 'obstructionist tactic'

to prevent environmental protection than it may already have become." Petition for a Writ of Certiorari (hereinafter "Pet."), Appendix A at 28a (citing and quoting *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 838 (6th Cir. 1981)).

Douglas County's effort to compel preparation of an EIS is misguided because the economic concerns that underlie its effort have been addressed fully by the defendants, Secretary Babbitt and the U.S. Fish and Wildlife Service ("FWS"), in preparing their designation of critical habitat for the spotted owl. As the district court observed in dismissing Douglas County's claim under the ESA that the economic effects of the critical habitat designation had not been addressed:

> The record reflects that FWS prepared an analysis of the economic impacts of [the critical habitat] designation for publication in conjunction with the proposed rule prior to each proposed designation. . . . FWS reviewed county level economic impacts and revenue sharing impacts with calculations of the employment and revenue losses. FWS also developed and implemented a four step process to examine whether any critical habitat area should be excluded because the benefits of exclusion outweighed the benefits of inclusion. . . .
>
> With regard to each impacted county, FWS considered the economic impacts, anticipated future harvest, owl factors, and other benefits and proposed a decision on exclusion. . . .
>
> In summary, the administrative record in this case reveals that FWS adequately considered relevant economic issues associated with

> critical habitat designation and particularly those of employment and revenue loss due to decreased federal timber sales. Plaintiff was afforded an opportunity to respond to both FWS's economic analysis and FWS's balancing process.
>
> Based on the foregoing, I find that FWS took a "hard look" at the impacts question[,] . . . and conducted a "reasonably thorough discussion" of the effects at issue.

Pet., App. B at 35a-36a (citations omitted).

Under these circumstances, it appears that Douglas County's pursuit of its claim under NEPA, and its petition to this Court, are not prompted by any genuine concern for protection of the environment, or by a concern about the absence of a forum for expressing their views to the government. Instead, the County appears to be moved solely by dissatisfaction with the ultimate designation of critical habitat for the northern spotted owl and the desire to delay that designation.

THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *FLINT RIDGE* OR THE DECISION OF ANY COURT OF APPEALS.

A. The Court's *Flint Ridge* Decision Does Not Address The Question Presented And Decided In This Case.

Petitioners assert that the court of appeals' decision in this case conflicts with the Court's decision in *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776 (1976), and the decisions of six other circuits that have followed *Flint Ridge*. Pet. at 7-13. Petitioners are wrong. *Flint Ridge* and the decisions that follow it, including decisions of the ninth circuit, *see, e.g., Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986), simply address a different NEPA question than the issue raised and decided here.

In *Flint Ridge*, the question resolved was whether NEPA must give way, in the presence of a direct and irreconcilable conflict between NEPA and another statute that would prevent any compliance with NEPA. 426 U.S. at 788-89.[1] The Court, of course, concluded that under such circumstances, "NEPA's impact statement requirement is inapplicable." *Id.* at 792. Both before and after the

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[1] In *Flint Ridge*, the Court assumed, without deciding, that NEPA would actually apply to the challenged actions. 426 U.S. at 788-89 ("And so the question we must resolve is whether, *assuming* an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare [an EIS] would create an irreconcilable and fundamental conflict. . . . " (emphasis added)).

Court's *Flint Ridge* decision, however, the courts of appeal have recognized, in a scattered handful of cases, unique circumstances where the procedures required by NEPA (on the one hand) and the requirements of another statute (on the other) overlap to such an extent that compliance with NEPA would be redundant, contrary to the intent of Congress, or would frustrate the purposes of both NEPA and the other statute. *See, e.g., State of Alabama ex rel. Siegelman v. Environmental Protection Agency*, 911 F.2d 499 (11th Cir. 1990) (no EIS required for certain EPA actions under the Resource Conservation and Recovery Act); *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (no EIS required for certain actions under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")); *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981) (no EIS required for decision to list a species under the Endangered Species Act); *Environmental Defense Fund v. Environmental Protection Agency*, 489 F.2d 1247 (D.C. Cir. 1973) (no EIS required for certain actions under FIFRA); *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (no EIS required for certain actions under the Clean Air Act); *see also Warren County v. North Carolina*, 528 F.Supp. 276 (E.D.N.C. 1981) (no EIS required for an action under the Toxic Substances Control Act); *Chesapeake Bay Foundation v. Virginia Water Control Board*, 453 F.Supp. 122 (E.D. Va. 1978) (same, Federal Water Pollution Control Act). In each of these cases, which turn on their individual facts and circumstances, the courts have not required compliance with NEPA even though they did not find a direct and irreconcilable statutory conflict that barred NEPA compliance as in *Flint Ridge*. This case too is

but another in the handful of NEPA cases that *Flint Ridge* does not address. In short, the fundamental premise of petitioner's argument on the first question presented – that an irreconcilable statutory conflict is "the *only* basis for avoiding NEPA compliance," Pet. at 12 (emphasis in original) – is not supported by the case law.[2]

B. The Court Of Appeals' Decision In This Case Is Consistent With Other Cases Where The Courts Of Appeal Have Found Strict NEPA Compliance Unnecessary.

The court of appeals' decision in this case falls within a small – but well recognized – category of cases noted above where compliance with NEPA has not been required. As the court of appeals explained:

> In *Merrell v. Thomas*, 807 F.2d at 778, we found that NEPA did not apply when the EPA registered pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and concluded that because Congress created two different mechanisms in FIFRA and NEPA, and because Congress declined the opportunity to apply NEPA to FIFRA, that it intended that

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[2] Indeed, in several of the court of appeals' decisions that petitioners cite as conflicting with the ninth circuit decision in this case, the courts recognized that this Court's decision in *Flint Ridge* does not describe the only situation that may render NEPA inapplicable. *See, e.g., Limerick Ecology Action v. U.S. Nuclear Regulatory Comm'n*, 869 F.2d 719, 729 & n. 7 (3d Cir. 1989) (citing and discussing cases that find NEPA inapplicable even in the absence of a direct and irreconcilable statutory conflict) (cited in Petition at 11).

> FIFRA procedures replace NEPA for pesticide registration.
>
> . . .
>
> The legislative history of the ESA at issue in the instant case follows a similar pattern and convinces us that Congress intended that the ESA procedures for designating a critical habitat replace the NEPA requirements.

Pet., App. A at 15a-16a.[3] Because petitioners cannot argue that the court of appeals' decision in *Merrell* – or the group of cases to which it belongs – are wrong and warrant this Court's review, they attempt to distinguish this case from *Merrell*. Pet. at 13-19. This effort is flawed.

First, petitioners assert that "*Merrell* is inapplicable here because the court of appeals acknowledged in this case that 'time constraints alone would not prevent the Secretary from preparing an EIS.' " Pet. at 14. Petitioner's focus on time constraints, however, perpetuates their incorrect assumption that the outcome of this case is controlled by *Flint Ridge* and therefore conflicting statutory timelines are necessary to render NEPA inapplicable. Yet as *Merrell* itself makes clear, a comparison of statutory structure, including statutory timelines, is only one element in determining whether NEPA applies in the face of a separate but comprehensive statutory scheme that also

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[3] The court in *Merrell* cited several of the cases where courts have found NEPA procedures replaced by the provisions of other statutes, including cases cited *supra* at 6. *See* 807 F.2d at 781. While the court acknowledged that its decision was consistent with these earlier rulings, it found no need to articulate a single principle to encompass all of these decisions. *Id.*

fully addresses environmental impacts. 807 F.2d at 778-81 (reviewing a number of additional factors).

Second, petitioners assert that *Merrell* is inapplicable in this case because the legislative history of FIFRA that was at issue in *Merrell* is significantly different from the history of the ESA. Pet. at 17-19. This quibble with the court of appeals' application of an uncontroversial legal principle is not the kind of important legal issue that warrants the Court's review. Moreover, the court of appeals carefully considered Douglas County's arguments regarding legislative history, Pet., App. A at 20a-21a, and rejected them because it found that, as in *Merrell*, other aspects of the ESA's legislative history provided persuasive evidence that Congress did not intend NEPA procedures to apply to the designation of critical habitat. *Id.* at 16a-20a.[4] Petitioners simply fail to identify any meaningful distinction between this case and *Merrell*.[5] And they do not and cannot argue that *Merrell*

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[4] Petitioners also criticize the court of appeals for concluding that Congress had approved the agency practice of not following NEPA procedures in designating critical habitat. Pet. at 19. Again, however, petitioner ignores the primary legislative analysis of the court of appeals which focuses on passage of the ESA amendments that established the procedures for designating critical habitat. Pet., App. A at 16a-18a.

[5] Petitioners also argue that the court of appeals incorrectly followed the Sixth Circuit's analysis in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). *See* Pet. at 15-17. Here too, petitioners are wrong. *Pacific Legal Foundation*, like *Merrell* and the other cases cited *supra* at 6, recognizes that in a number of unusual and limited circumstances, NEPA procedures may give way to other complex statutory schemes, even in the absence of an irreconcilable conflict. The factors the court of appeals considered in *Pacific Legal Foundation* are among the factors the

presents a significant, or controversial legal issue that would require this Court's intervention.[6]

Because the court of appeals' decision in this case is grounded in a small but recognizable area of NEPA jurisprudence, because the decisions in this area do not conflict with the decision of this Court in *Flint Ridge* or with the decisions of other courts of appeal, and because the petition does not otherwise present any significant legal issue requiring this Court's intervention, the Court should deny the petition.

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courts have considered in other similar cases. *Compare Pacific Legal Foundation*, 657 F.2d at 835-41, *with Alabama ex rel. Siegelman v. EPA*, 911 F.2d at 504-505. These are also among the factors the court of appeals considered and applied here, *see* Pet., App. A at 15a-21a. Contrary to petitioner's argument, these factors are neither irrelevant nor wrong. Pet. at 16.

[6] Petitioner's citation of *Catron County v. Fish and Wildlife Service*, No. 93-730-HB (D.N.M. slip op. Oct. 13, 1994), does not affect this conclusion since the district court in *Catron County* faced the same issue raised in this case – whether NEPA applies to the designation of critical habitat under the ESA – and simply adopted the analysis of the district court here to resolve that question. At the time of the district court ruling in *Catron County*, however, the court of appeals had not issued its ruling in this case. The court of appeals, of course, properly rejected the district court's analysis in this case and the Tenth Circuit may be expected to do the same when it considers *Catron County*. In any event, until the Tenth Circuit reaches a different result, there is no conflict among the circuits nor has petitioner identified any cases on this issue, other than *Catron County*, making their way through the federal courts.

II. THE COURT OF APPEALS' DISCUSSION OF WHEN AN EIS IS NOT REQUIRED IS CONSISTENT WITH THE EXPRESS LANGUAGE OF NEPA AND THIS COURT'S DECISION IN *METROPOLITAN EDISON.*

In addressing the second question presented, petitioner asserts that the court of appeals' decision not to require preparation of an EIS to accompany the designation of critical habitat for the northern spotted owl is based on an improperly "implied exemption" from NEPA. Pet. at 20-23.[7] Petitioner is wrong. The court of appeals' discussion of this issue, *see* Pet., App. A at 21a-24a, is consistent with the express language of NEPA and this Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). Accordingly, it does not warrant review by this Court.

By its terms, NEPA applies to those "major federal actions" that may "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C). In *Metropolitan Edison*, this Court concluded that NEPA's language requiring a detailed environmental analysis is inextricably predicated upon some "change in the physical environment." 460 U.S. at 774. Other courts have reached similar conclusions:

> [T]he Secretary's implementation of the [Boundary Waters Canoe Area] Act enables no person

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[7] If the Court declines to hear the first question presented in Douglas County's petition (as it should), it need not reach the second question presented because it addresses only an alternate holding or *dicta* in the court of appeals' decision in any event.

> to significantly affect the Wilderness. In fact, plaintiffs' major complaint is simply that Congress' mandate to the Secretary will effectively close portions of the Wilderness to many, thus not enabling these persons to motorboat and snowmobile throughout the Wilderness. *In essence, plaintiffs' claim is that the Department of Agriculture must prepare an EIS in order to leave nature alone.* The Court is not moved by this argument.

National Association of Property Owners v. United States, 499 F.Supp. 1223, 1265 (D.Minn. 1980), *aff'd*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (emphasis added); *see also Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669 (5th Cir. 1992), *cert. denied sub nom, Texas Water Conservation Ass'n v. Dept. of Interior*, ___ U.S. ___, 113 S.Ct. 75 (1992) (no EIS required for acquisition of conservation easement); *Como-Falcon Community Coalition v. U.S. Dept. of Labor*, 609 F.2d 342, 345-46 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980) (establishment of jobs corps center on existing college campus does not affect natural environment and does not require an EIS); *Breckenridge v. Rumsfeld*, 537 F.2d 864, 865-67 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977) (closure of military base does not require EIS where no primary impact on the physical environment will occur); *Sierra Club v. Marsh*, 692 F.Supp. 1210 (S.D. Cal. 1988), *aff'd on other grounds*, 816 F.2d 1376 (9th Cir. 1987) (no EIS required for transfer of mitigation lands to wildlife refuge as part of settlement). None of these cases involves an "implied exemption" from NEPA.[8]

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[8] Petitioner also argues that the court of appeals must have misinterpreted NEPA because they find the lower court's

The decision in this case is fully consistent with these rulings, this Court's opinion in *Metropolitan Edison*, and the express language of NEPA. The designation of critical habitat under the ESA creates no perceptible impact on the physical environment – it causes no consumptive use of the forests, leads to no deterioration or degradation of physical resources, and neither disturbs nor alters the existing environment. Thus, it is indistinguishable from the conservation easement at issue in *Sabine River*, *supra*, or the transfer of mitigation lands in *Sierra Club v. Marsh*, *supra*. Rather than directly or indirectly causing a change in the physical environment, which *Metropolitan Edison* indicates is a triggering factor for preparation of an EIS, designation of critical habitat leaves the environment alone.

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decision internally inconsistent. According to petitioner, the court could not properly conclude (on the one hand) that petitioner had established sufficient injury-in-fact for standing and then find (on the other hand) that the challenged action would not cause sufficient environmental impacts to trigger NEPA. Pet. at 21.

Petitioner's argument incorrectly confuses the standing injury-in-fact inquiry with the merits of the case. Petitioner's contention would require that every plaintiff who has standing to bring a NEPA case necessarily will win a claim that the challenged action requires preparation of an EIS. Obviously, this is not so. In each of the cases cited in the text, for example, the plaintiffs presumably had suffered an injury-in-fact sufficient to establish their standing (e.g., the plaintiffs in *Sabine River* undoubtedly were injured in fact because they would not be able to build a reservoir on the land subject to the conservation easement) but they still were not entitled to relief on their claim under NEPA. Moreover, petitioner's economic injury in this case is not within the zone of environmental interests that NEPA is designed to protect.

Petitioner seeks to avoid this conclusion by pointing out that nature itself changes the physical environment. Pet. at 21. This argument, however, converts any decision not to act – any decision to leave the environment alone and allow natural processes to unfold – into a major federal action requiring an EIS. The fact that the designation of critical habitat "allow[s] more areas to acquire old-growth characteristics," Pet., App. B at 55a, is nothing but an attempt to mask the fact that the federal government is doing *nothing at all* on lands designated as critical habitat under the ESA. The rule designating critical habitat does not *use* the property, but instead leaves it in its natural state and allows natural processes to occur. In short, petitioners are wrong when they assert that the decision to designate critical habitat for a threatened species triggers NEPA procedures.[9]

Contrary to petitioner's claim, the court of appeals did not base its decision in this case on an improper "implied exemption" from NEPA. The second question presented does not warrant this Court's review.

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[9] Petitioner argues that the decision in the *Sabine River* case supports their position because there the government prepared an environmental assessment (EA) before concluding that it did not need to prepare an EIS. Pet. at 22. The issue in this case, of course, is whether the government is *required* to follow NEPA for the designation of critical habitat and prepare either an EA or an EIS. The fact that the government may have *chosen* to prepare an EA in some other case where it may not have needed to is simply not probative of the issue here.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

TODD D. TRUE
Counsel of Record
PATTI GOLDMAN
SIERRA CLUB LEGAL DEFENSE FUND
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340

Attorneys for Respondents

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